

EXHIBIT B



November 9, 2018

VIA ELECTRONIC MAIL

FOIA Officer
Department of Veterans Affairs
FOIA SERVICE
810 Vermont Avenue, NW
(005R1C) VACO
Washington, DC 20420
vacofoiaservice@va.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Veterans Affairs FOIA regulations, 38 C.F.R. §§ 1.550 *et seq.*, Democracy Forward Foundation (“Democracy Forward”) makes this request for records on its own behalf and on behalf of the VoteVets Action Fund (“VoteVets”).

Records Requested

On October 23, 2018, the *Washington Post* published a story revealing that – in a stark departure from past practice – four longtime civil-service applicants to serve as Veterans Law Judges on the Board of Veterans Appeals at the Department of Veterans Affairs (“Department” or “VA”) were rejected after the White House required them to disclose their party affiliation as well as social media and other documentation of their participation in the political process.¹

In an effort to understand and explain to the public the selection process for Veterans Law Judges and the role of partisanship therein, Democracy Forward requests the following records:

1. Any and all communications between any appointee, employee or contractor at the VA and any email address ending in the suffix eop.whitehouse.gov concerning (a) the application and selection process for William Donnelly, Evan Weichert, Cynthia Skow,

¹ See Lisa Rein, ‘I’ve Never Seen These Positions Politicized’: White House Rejection of Veterans Judges Raises Concerns of Partisanship, Wash. Post (Oct. 23, 2018), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html?noredirect=on&utm_term=.27cefcc80f1c.

and Lauren Cryan to be appointed Veterans Law Judges or (b) the application and selection process whereby Karen Kennerly, David Gratz, John Hutcheson and Jebby Rasputnis were not appointed Veterans Law Judges. Included herein should be any and all application materials from any of the named candidates, among other communications concerning the application and selection process.

Please search records in the following offices: Office of the Secretary of Veterans Affairs, Board of Veterans Appeals, Office for Public and Intergovernmental Affairs, Office of Congressional and Legislative Affairs, Office of Human Resources and Administration, Office of Labor Management Relations, and Office of General Counsel.

Please include the following among the custodians to be searched: William Donnelly, Evan Weichert, Cynthia Skow, Lauren Cryan, Karen Kennerly, David Gratz, John Hutcheson, Jebby Rasputnis, Cheryl L. Mason, Douglas Massey, and Curt Cashour.

2. Any and all communications within the VA concerning (a) the application and selection process for William Donnelly, Evan Weichert, Cynthia Skow, and Lauren Cryan to be appointed Veterans Law Judges or (b) the application and selection process whereby Karen Kennerly, David Gratz, John Hutcheson and Jebby Rasputnis were not appointed Veterans Law Judges. Included herein should be any and all application materials from any of the named candidates, among other communications concerning the application and selection process.

Please search records in the following offices: Office of the Secretary of Veterans Affairs, Board of Veterans Appeals, Office for Public and Intergovernmental Affairs, Office of Congressional and Legislative Affairs, Office of Human Resources and Administration, Office Labor Management Relations, and Office of General Counsel.

Please include the following among the custodians to be searched: William Donnelly, Evan Weichert, Cynthia Skow, Lauren Cryan, Karen Kennerly, David Gratz, John Hutcheson, Jebby Rasputnis, Cheryl L. Mason, Douglas Massey, and Curt Cashour.

3. Any and all communications within the VA pertaining to the October 23, 2018 *Washington Post* article, either prior to or following publication of the article.

Please search records in the following offices: Office of the Secretary of Veterans Affairs, Board of Veterans Appeals, and the Office for Public and Intergovernmental Affairs.

Please include the following among the custodians to be searched: William Donnelly, Evan Weichert, Cynthia Skow, Lauren Cryan, Karen Kennerly, David Gratz, John Hutcheson, Jebby Rasputnis, Cheryl L. Mason, Douglas Massey, and Curt Cashour.

For all items, please search for records created between March 1, 2018 and the present.

Request for Fee Waiver

Democracy Forward and VoteVets request a waiver of document search, review, and duplication fees. 5 U.S.C. § 552(a)(4)(A)(iii); 38 C.F.R. § 1.561(n)(1). A fee waiver is appropriate because the disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

A fee waiver is further justified because the requested records concern the “operations or activities of the government” in a direct way—specifically, the application and selection process for the influential Board of Veterans Appeals, which, in fiscal year 2018 alone, issued 85,288 decisions on veterans’ benefits claims. 38 C.F.R. § 1.561(n)(3)(i). Disclosure will have tremendous informative value and is likely to significantly contribute to the public’s understanding of whether partisanship improperly intruded into that civil-service selection process. *See* 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 38 C.F.R. § 1.561(n)(3)(ii-iv). Indeed, the news account referenced above underscores the substantial public interest in the kinds of records sought through this request. *See Rein, supra* note 1.

Democracy Forward also requests a waiver of search fees on the ground that it qualifies as a “representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 38 C.F.R. § 1.561(b)(7). Democracy Forward meets the definition of “representative[s] of the news media” because it gathers information, exercises editorial discretion in selecting and organizing documents, and “distributes the resulting work to the public.” *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). As in other work Democracy Forward has done, Democracy Forward intends to use the disclosed records to provide necessary and noteworthy information to the general public by disseminating relevant information through its website, social media, and other platforms at no cost to the public.² It is therefore a “representative of the news media” for the same reasons it is “primarily engaged in disseminating information.” *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).

Finally, a fee waiver is appropriate in this case because the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). Democracy Forward is a nonprofit organization organized under Internal Revenue Code § 501(c)(3) and is dedicated to, among other things, monitoring and educating the public about executive action. VoteVets is a nonprofit organization organized under Internal Revenue Code § 501(c)(4) that is focusing on ensuring that the voices of America’s veterans are included in matters of public policy through policy engagement and civic education. As nonprofit organizations, Democracy Forward and VoteVets do not have a commercial interest in the records, which will be made available to the public at no cost.

If the request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to \$100. If the costs of

² See, e.g., Vera Bergengruen, *New Emails Show What Happens When The Pentagon Has To Scramble To Catch Up To Trump*, BuzzFeed News (July 25, 2018), <https://www.buzzfeednews.com/article/verabergengruen/these-emails-show-what-happens-when-the-white-house-keeps> (citing to emails obtained through a request for documents made by Democracy Forward under the FOIA); *see also* Democracy Forward (@DemocracyFwd), Twitter (July 27, 2018, 8:45 AM), <https://twitter.com/DemocracyFwd/status/1022870550769754112>.

responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

Conclusion

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20-day period, please contact Josephine Morse as soon as possible at foia@democracyforward.org or 202-701-1790.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Josephine Morse.

Josephine Morse
Democracy Forward Foundation